STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

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Corbin R. Davis, Clerk of the Court
Supreme Court of Michigan
925 W. Ottawa - 4th Floor
P:O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2002-29

Dear Mr. Davis:

I would like to add my voice to the debate about lawyer incompetence that Justice Young hoped would be sparked by the Court's corrected order of July 29, 2003, publishing the Proposed Michigan Standards for Imposing Lawyer Sanctions. I agree with Justice Young that it is a troubling issue, and he is correct to say that the debate must be how, and not whether, the organized Bar will self-police its incompetent members.

Those of us who work full-time in Michigan's discipline system are well acquainted with the problems caused by incompetent lawyers. Many of the approximately 200 formal complaints filed every year by the Attorney Grievance Commission involve either incompetence or one of its byproducts such as neglect. Unlike some states, Michigan's discipline system considers lawyer incompetence to be a fit subject for prosecution.

The Michigan Rules of Professional Conduct do, as Justice Young points out, distinguish between neglect and incompetence. This distinction was explicitly relied on by the Attorney Discipline Board in 1997, when it reversed the hearing panel's grant of summary disposition in Grievance Administrator v Bruce J. Sage, ADB Case No. 96-35-GA (2/14/97). The American Bar Association Standards for Imposing Lawyer Discipline (which the Commission and the Board had been using informally for 14 years prior to the Court's Lopatin decision) also treat incompetence and neglect as separate categories of misconduct. The Board kept the incompetence/neglect distinction in the proposed Michigan standards it submitted to the Court, and I believe it is one worth preserving.

There is no question that the Commission more often prosecutes lawyers for neglect, as opposed to pure incompetence. However, that is simply a reflection of the nature of the grievances we receive, and is not the result of some institutional reluctance to confront lawyer incompetence.

Except for criminal cases, specific allegations of pure incompetence are not the dominant feature of most grievances filed with the Commission. I suspect this is so because once an attorney-client relationship finally sours enough to prompt a grievance, issues concerning the lawyer's incompetence are largely eclipsed by allegations as to lack of diligence, neglect, failure to communicate or misrepresentation.

No client knowingly hires an incompetent lawyer; instead, the lawyer's incompetence manifests itself gradually in such things as missed deadlines or court dates, as well as unreturned phone calls and letters. The incompetent lawyer is frequently exposed to the client (and eventually to the Commission) by his lack of diligence, failure to communicate and neglect, all of which carry disciplinary consequences at least as harsh, if not more so, as his lack of competence.

The problem is not that incompetent lawyers escape discipline; most of the Commission's prosecutions are rooted in lawyer incompetence, either a pure version or some variation on the incompetence theme. The real problem is that the discipline system necessarily becomes involved after the fact, when the lawyer's incompetence has already harmed the client. A credible disciplinary system is certainly a necessary part of the legal profession's fight against incompetence, but a punitive approach by itself will not solve the problem. The legal profession also must help people avoid incompetent lawyers in the first place.

A state sponsored certification plan as envisioned by ABA Model Rule 7.4(c), and already in existence in 12 states, might be one way to do this. Allowing lawyers to be certified as specialists in a field of law would enable prospective clients, particularly those with little or no experience in retaining lawyers, to make more intelligent choices.

Michigan currently permits a lawyer, pursuant to MRPC 7.4, to "communicate the fact that the lawyer does or does not practice in particular fields of law." Many Michigan lawyers advertise a specialty in one or more fields of law, but there is no practical

way to verify their claims. If the Court designated a regulatory agency or approving authority to grant certification, then much of the advertising hype could be eliminated. Certification could begin with the fields of criminal law, family law, probate and personal injury, which together historically account for more than 60% of all grievances.

Certification is voluntary, so the objections raised against mandatory continuing legal education wouldn't apply. The incentive to be certified should be strong, given the advantages it offers to the lawyer for client development.

Florida has had a certification plan for 20 years, and it was described recently by the Chief Justice of their Supreme Court as one of the "crown jewels" of the Florida justice system. It is time for Michigan's legal profession to implement such a plan.

Sincerely,

Robert E. Edick

Robert E. Edick
Deputy Administrator

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